Supreme Court, U.S.
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92-572

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GEORGE JAMES SANTIKOS,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

Petition For Writ Of Certiorari To
The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Texas Alcoholic Beverage Code, § 101.04, which provides for warrantless inspections of premises licensed to sell alcoholic beverages "at any time," is immune from a facial invalidity claim under the "time, place, and scope" criteria of *New York v. Burger*, 482 U.S. 691 (1987), because of the reasoning in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), that the "overbreadth" doctrine is not recognized outside the limited context of the First Amendment.

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NO. _____

IN THE

Supreme Court of the United States

GEORGE JAMES SANTIKOS,
Petitioner,

V.

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

THE OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, yet to be published, which affirmed Petitioner's conviction by holding that he lacked standing to attack the constitutionality of the Texas statute authorizing the warrantless inspection of premises licensed to sell alcoholic beverages, is reproduced as Appendix A. *Santikos v. State*, ___ S.W.2d ___, No. 923-88 (Tex.Cr.App. 1992).

STATEMENT OF JURISDICTION

Based on Petitioner's Motion for Rehearing, the Texas Court of Criminal Appeals rendered its decision affirming his conviction on June 3, 1992.

Petitioner asserted in his Petition for Discretionary Review to the Texas Court of Criminal Appeals that § 101.04 of the Texas Alcoholic Beverage Code, which authorizes warrantless inspections "at anytime," was in violation of the Fourth Amendment to the United States Constitution.

This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The question presented herein involves the Fourth Amendment to the United States Constitution, which reads in its entirety as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Also involved is the Texas statute that authorizes warrantless inspections, namely, Texas Alcoholic Beverage Code, § 101.04, which reads in its entirety, emphasis supplied, as follows:

> "By accepting a license or permit, the holder consents that the commission, an authorized representative of the commission, or a peace officer may enter the licensed premises *at anytime* to conduct an investigation or inspect

the premises for the purpose of performing any duty imposed by this code."

STATEMENT OF THE CASE

Petitioner was charged with intentionally and knowingly possessing a controlled substance, namely, cocaine, which was found in his night club during a warrantless inspection pursuant to the Texas Alcoholic Beverage Code, § 101.04.

Gus Martinez and other agents of the Texas Alcoholic Beverage Commission went to the Cowgirl Club, in Victoria, Texas on the night of July 18, 1986, to conduct a routine inspection of the licensed premises. One agent inspected the bar area while Martinez and another agent went to the office of Petitioner who was the proprietor of the club. Petitioner was on the phone in the office when the agents entered. According to Martinez, he was there to inspect for unauthorized alcoholic beverages, stamps, paraphernalia, false records, or anything pertaining to the Alcoholic Beverage Code. After Martinez attempted to open a locked filing cabinet in the office, Petitioner reached into his pocket, pulled out some keys, and unlocked the cabinet. Martinez ultimately opened the bottom drawer of the cabinet and saw a paper sack agape. He observed therein what appeared to be narcotics' paraphernalia. Martinez pulled the paper sack out of the cabinet and asked Petitioner whether cocaine was contained in the sack. Petitioner responded by stating that he found the sack in the parking lot. Martinez and another agent then searched the private bathroom immediately after the inspection of the office area. An agent found a vial of cocaine inside of a roll of toilet paper.

Petitioner filed a Motion to Suppress the cocaine seized during the warrantless inspection. After a hearing on

the Motion Petitioner was allowed to file a brief wherein he argued inter alia the issue presented herein. Petitioner's Motion was subsequently denied. (Tr. 19, *et seq.*) Petitioner thereafter entered a plea of no contest to the indictment and, pursuant to a plea bargain agreement, was assessed a penalty of two years confinement, probated, and a $2,500.00 fine.

Judgment of conviction was imposed on September 18, 1987. A timely written notice of appeal pursuant to the provisions of Tex. R. App. Proc., Rule 40(b)(1) was immediately filed. Direct appeal was taken to the Thirteenth Court of Appeals, at Corpus Christi, Texas, No. 13-87-393-CR. The question presented herein was raised in the Court of Appeals. That Court affirmed Petitioner's conviction on June 30, 1988. *Santikos v. State*, 754 S.W.2d 416 (Tex.App. -- Corpus Christi 1988, pet. granted).

On August 25, 1988, a Petition for Discretionary Review was filed with the Texas Court of Criminal Appeals. On April 5, 1989, the Texas Court of Criminal Appeals granted the Petition for Discretionary Review and ordered the respective parties to file supporting briefs. Based on Petitioner's Motion for Rehearing, the Court of Criminal Appeals rendered its decision affirming his conviction on June 3, 1992. On June 30, 1992, the Court of Criminal Appeals denied Petitioner's second request for a rehearing. See Appendix B.

This Petition for Writ of Certiorari is being filed with the Clerk of this Court within ninety (90) days after entry of the Texas Court of Criminal Appeals' judgment and is timely. Supreme Court Rules 13.1 and 13.4.

REASONS FOR GRANTING THE WRIT

On direct appeal and on discretionary review, Petitioner contended that § 101.04 was unconstitutional because it failed to limit warrantless inspections to certain times of the day or night or to reasonable business hours. Petitioner argued that this Court held that warrantless inspections of commercial premises in certain highly regulated industries may be valid exceptions to the Fourth Amendment warrant requirement only if certain criteria are met. *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). Among those criteria is the requirement that the statutory provision must provide "a constitutionally adequate substitute for a warrant" so as to properly limit the discretion of the officers performing the inspection. *New York v. Burger*, 482 U.S. at 708-710. In defining how to constitutionally restrict the discretion of the inspectors, this Court stated that the statute must carefully limit the inspection "in time, place, and scope." *New York v. Burger*, 482 U.S. at 703, citing *United States v. Biswell*, 406 U.S. 311, 315, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972). Although the Texas Court of Criminal Appeals agreed with this proposition, it declined to address the merits of Petitioner's claim by holding that since the warrantless inspection at the Cowgirl club took place during regular business hours Petitioner failed to demonstrate that the statute was unconstitutionally applied to him and that Petitioner therefore lacked standing to assert the issue, relying on and citing *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

By its decision, the Texas Court of Criminal Appeals has decided an important question of federal constitutional law which has not been, but should be, settled by this Court, namely, whether a criminal defendant is invariably precluded from challenging a statute which is facially repugnant to the

Fourth Amendment, but which was not unconstitutional in its application. Further, the Texas Court of Criminal Appeals' opinion is in conflict with the spirit of applicable decisions of this Court upholding the sanctity of the Fourth Amendment. Supreme Court Rule 10.1(c).

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute is constitutionally applied may not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in other situations. *Broadrick v. Oklahoma*, 413 U.S. 601, 610. Stated in different terms, a party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on its own rights. *Ulster County Court v. Allen*, 442 U.S. 140, 155-156, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). As a general rule, if there was no constitutional defect in the application of a statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. *Ulster County Court v. Allen*, 442 U.S. at 155, citing *Broadrick v. Oklahoma*, 413 U.S. at 610.

In the past, this Court has recognized some limited exceptions to this principle, but only because of the most "weighty countervailing policies." *Broadrick v. Oklahoma*, 413 U.S. at 611, citing *United States v. Rains*, 362 U.S. 17, 22-23, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). A limited exception has been recognized for statutes that prohibit speech protected by the First Amendment. *Ulster County Court v. Allen*, 442 U.S. at 155, citing *Broadrick v. Oklahoma*, 413 U.S. at 611-616. In *United States v. Salerno*, 41 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), this Court stated, "A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set

of circumstances exists under which the act would be valid." 481 U.S. at 745. This Court in *Salerno* cautioned that the fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since it has not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. *Id.*

Petitioner contends that because of the substantial counterbalancing policies inherent in preserving the right of persons to be free from unreasonable warrantless searches, the Fourth Amendment, like the First Amendment, warrants exception to the general rule prohibiting facial challenges.

Unarguably, the history of Fourth Amendment jurisprudence reveals the deeply rooted concern of upholding the core principles of the exclusionary rule, viz,

> Decisions of this Court applying the exclusionary rule to unconstitutionally seized evidence have referred to "the imperative of judicial integrity," *Elkins v. United States*, 364 U.S. 206, 222, 4 L.Ed.2d 1669, 80 S.Ct. 1437 (1960), although the Court has relied principally upon the deterrent purpose served by the exclusionary rule. See *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 681, 81 S.Ct. 1684 (1961), *Lee v. Florida*, 392 U.S. 378, 20 L.Ed.2d 1166, 88 S.Ct. 2096 (1968); see also *United States v. Calandra*, 414 U.S. 338, 38 L.Ed.2d 561, 94 S.Ct. 613 (1974); *Michigan v. Tucker*, 417 U.S. 433, 41 L.Ed.2d 182, 94 S.Ct. 2357 (1974). And see also OAKS, STUDYING THE EXCLUSIONARY RULE IN SEARCH AND SEIZURE, 37 U Chi L Rev 665, 668-672 (1970).

United States v. Peltier, 422 U.S. 531, 536, 45 L.Ed.2d 374, 380, 95 S.Ct. 2313 (1975).

Fourth Amendment interests at stake in inspection cases have never been held to be "peripheral." *Camara v. Municipal Court*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 930 (1967). From *Camera* to *Burger* the ultimate elixir became an inspection that provided an adequate substitute for a warrant.

The proposition that Fourth Amendment concerns are not on the same plateau as those of the First Amendment is absurd. This Court in *Ulster County Court v. Allen, supra*, after noting the First Amendment exception, stressed that this exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech. 442 U.S. at 155. Likewise, the exclusionary rule was necessarily woven into the Fourth Amendment to give it meaningful effect and to deter potentially overzealous, and perhaps unscrupulous, police conduct.

CONCLUSION

For the foregoing reasons, Petitioner, George James Santikos, respectfully suggests that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

GEORGE JAMES SANTIKOS, Appellant
NO. 923-88, v.
THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Thirteenth Court of Appeals

(Victoria County)

OPINION ON APPELLANT'S MOTION FOR REHEARING

We withdraw our prior opinion and adopt the following as the opinion of the Court.

Appellant, George James Santikos, pled nolo contendere to the unlawful possession of a controlled substance, cocaine. The trial court assessed punishment at two years' confinement, probated, plus a $2500.00 fine. On direct appeal, the Corpus Christi Court of Appeals overruled appellant's three points of error and affirmed his conviction. Santikos v. State, 754 S.W.2d 416 (Tex.App.-Corpus Christi 1988). We granted appellant's petition for discretionary review to determine whether the Court of Appeals correctly held that the administrative search provision in Section 101.04 of the Texas Alcoholic Beverage Code (hereinafter T.A.B.C.) is constitutional under the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Texas Constitution.[1] We shall affirm.

---

[1] We note that appellant challenges the constitutionality of Section 101.04 under both the Texas and the Federal Constitutions. Although this Court recently determined that we shall not be bound by United States' Supreme Court decisions addressing the Fourth Amendment when analyzing Article I, Section 9 of the Texas Constitution, appellant neither argues the constitutional provisions separately nor contends that there are reasons for distinguishing the two provisions in this case. Heitman v.

On April 28, 1986, the Texas Alcoholic Beverage Commission issued a mixed beverage permit to the Cowgirl Club, Inc., d/b/a the Cowgirl Club. On July 18, 1986, at approximately 8:30 p.m. during the club's regular business hours, three agents of the Commission went to the club to inspect the premises for violations of the Texas Alcoholic Beverage Code pursuant to Section 101.04 of the Code. Appellant consented to the inspection and voluntarily unlocked a filing cabinet in the office of the club. The agents discovered drug paraphernalia[2] in the filing cabinet and a vial of cocaine in the office restroom. Appellant's pretrial motion to suppress this evidence was denied and appellant subsequently pled nolo contendere to possession of cocaine.

On direct appeal, appellant contended, among other things, that Section 101.04 was facially unconstitutional because the section failed to limit inspections conducted pursuant to the statute to certain times of the day or night or to reasonable business hours. The Court of Appeals first determined that the inspection of appellant's club occurred during regular business hours, and then held Section 101.04 to be constitutional because "it does not authorize unreasonable searches, nor can we presume that the provision

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State, 815 S.W.2d 681, 690 (Tex.Cr.App. 1991). Moreover, when this Court has previously addressed both federal and state constitutional challenges to Section 101.04, T.A.B.C., it has relied on Supreme Court decisions interpreting the Fourth Amendment. See Crosby v. State, 750 S.W.2d 768 (Tex.Cr.App. 1987), and McDonald v. State, 778 S.W.2d 88 (Tex.Cr.App. 1989). Consequently, we shall not distinguish between the constitutional provisions, but find them to be the same for the purpose of analyzing the constitutionality of the warrantless administrative search provision in Section 101.04.

[2] The agents discovered a grinder, scale and inhaler, all of which contained traces of cocaine, in the filing cabinet.

of this statute referring to the time for inspection will be applied unreasonably." Santikos v. State, 754 S.W.2d at 419. See Pollard v. Cockrell, 578 F.2d 1002, 1014 (5th Cir. 1978) (San Antonio ordinance held constitutional because it did not authorize unreasonable searches nor would it be presumed that search provision would be unreasonably applied).

Section 101.04 of the Texas Alcoholic Beverage Code states:

> "By accepting a license or permit, the holder consents that the commission, an authorized representative, or a peace officer may enter the premises at any time to conduct an investigation or inspect the premises for the purpose of performing any duty imposed by this code."

This section thus provides for warrantless, administrative inspections or searches of premises licensed by the Texas Alcoholic Beverage Commission. Appellant now contends that Section 101.04 is facially invalid because it fails to limit adequately the time that statutory warrantless inspections may occur.

The Supreme Court of the United States has held that warrantless inspections of commercial premises in certain highly regulated industries may be valid exceptions to the Fourth Amendment warrant requirement if three criteria are met. New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection or warrantless search is made. Second, the warrantless inspection must be necessary to further the regulatory scheme. Third, the statutory

provision must provide "a constitutionally adequate substitute for a warrant" so as to limit properly the discretion of the officers performing the inspection. New York v. Burger, 482 U.S. at 708-710, 107 S.Ct. at 2647-2648, 96 L.Ed.2d 601 (1987). In defining how to restrict constitutionally the discretion of the inspectors, the Supreme Court stated that the statute must carefully limit the inspection "in time, place, and scope." New York v. Burger, 482 U.S. at 703, 107 S.Ct. at 2644, citing United States v. Biswell, 406 U.S. 311 at 315, 92 S.Ct. 1593 at 1596, 32 L.Ed.2d 87 (1972).

A plurality of this Court has previously determined that Section 101.04 meets the first two criteria enunciated by the Supreme Court in Burger. Crosby v. State, 750 S.W.2d 768, 775 (Tex.Cr.App. 1987). See Colonnade Corp. v. United States, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (liquor industry long subject to close supervision and inspection). The plurality in Crosby also determined that Section 101.04 limits the scope of inspections but expressly left unanswered the question raised by appellant: whether Section 101.04 adequately limits the time and place of the statutory warrantless inspections as required by the third criteria in Burger. Crosby v. State, 750 S.W.2d at 771, n. 2, 775.

In a subsequent opinion, however, this Court held that Section 101.04 altogether does not violate the Fourth and Fourteenth Amendments to the United States Constitution nor does it violate Article I, Section 9 of the Texas Constitution. McDonald v. State, 778 S.W.2d 88, 91 (Tex.Cr.App. 1989). Although the majority in McDonald clearly held that Section 101.04 satisfies the three criteria enunciated in Burger, we shall address appellant's point of error because the opinion in McDonald did not expressly address appellant's allegation that the language "at any time" renders Section 101.04 facially unconstitutional.

A facial challenge to a statute is the most difficult challenge to mount successfully because the challenger must establish that no set of circumstances exists under which the statute will be valid. United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); Briggs v. State, 789 S.W.2d 918, 923 (Tex.Cr.App. 1990). Since a statute may be valid as applied to one set of facts and invalid as applied to another, "it is incumbent upon the [appellant] to show that in its operation the statute is unconstitutional as to him in his situation; that it may be unconstitutional as to others is not sufficient." Parent v. State, 621 S.W.2d 797 (Tex.Cr.App. 1981). See Briggs v. State, 740 S.W.2d 803, 806 (Tex.Cr.App. 1987).

This rule conforms with the criterion for standing to challenge the facial constitutionality of a statute as enunciated by the Supreme Court of the United States:

> "A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. Broadrick v. Oklahoma, 413 U.S. 601, 610, 37 L.Ed.2d 830, 93 S.Ct. 2908 (and cases cited). A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. (cites omitted)."
> Ulster County Court v. Allen, 442 U.S. 140, 154-155, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

Since Section 101.04 does not fall within the First Amendment exception, appellant must demonstrate that the statute was unconstitutionally applied to him.

The testimony from appellant's trial revealed that the inspection of the Cowgirl Club took place at 8:30 p.m. during the regular business hours of the club and during the hours the club was permitted to serve liquor under the Alcoholic Beverage Code. See Section 105.01, T.A.B.C. So, notwithstanding the "at any time" language in Section 101.04, the inspecting officers in appellant's case chose to inspect the club during its regular business hours. Therefore, we conclude that despite the "at any time" language in Section 101.04 the inspectors in appellant's case did not arbitrarily and indiscriminately use Section 101.04 to inspect or search the club without a warrant. See New York v. Burger, 482 U.S. at 711, 107 S.Ct. at 2648 (Supreme Court determined that New York statute placed appropriate restraints upon discretion of inspectors because inspection was allowed only "during regular and usual business hours"). Compare Baggett v. State, 722 S.W.2d 700 (Tex.Cr.App. 1987); Nesloney v. State, 711 S.W.2d 636 (Tex.Cr.App. 1986) (statutory language "any place, any time" in Section 47.037 of the Parks and Wildlife Code constitutionally inadequate to support warrantless searches). Section 101.04 was clearly not unconstitutionally applied to appellant. See United States v. Salerno, 481 U.S. at 745, 107 S.Ct. at 2100, 95 L.Ed.2d at 707 (just because a statute might operate unconstitutionally under some circumstances is insufficient to render it invalid). Under Broadrick v. Oklahoma, supra, therefore, we need not reach the question of the facial validity of Section 101.04, supra.

Accordingly, the judgment of the Court of Appeals is affirmed.

McCormick, Presiding Judge

(Delivered June 3, 1992)
En Banc
Publish

Baird and Benavides, JJ., not participating

GEORGE JAMES SANTIKOS, Petition for Discretionary
Appellant Review from the Thirteenth
- - - Court of Appeals
NO. 923-88, v.

THE STATE OF TEXAS, (Victoria County)
Appellee

DISSENTING OPINION ON APPELLANT'S MOTION FOR REHEARING

Because the majority fails to demonstrate that §101.04 meets the criteria laid down by the Supreme Court of the United States for such "inspection" statutes to pass constitutional muster in, e.g., Donovan v. Dewey, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981), and further explicated in New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987), I respectfully dissent.

Particularly the majority does not, and indeed cannot, find that this statute constitutes a "constitutionally adequate substitute for a warrant," Donovan v. Dewey, supra, at 603, S.Ct., at 2540, L.Ed.2d, at 272; cf. New York v. Burger, supra, at 710, S.Ct., at 2648, L.Ed.2d, at 619. See McDonald v. State, 778 S.W.2d 88 (Tex.Cr.App. 1989) (Clinton, J., dissenting at 91).

CLINTON, Judge

(Delivered: June 3, 1992)

EN BANC

PUBLISH

Maloney, J., joins.

APPENDIX B

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
RE: Case No. 0923-88
STYLE: Santikos, George James

June 30, 1992
COA # 13-87-00
393-CR

the Appellant's Motion for Rehearing was received and presented to the Court. Leave to file has been denied.

Thomas Lowe, Clerk

RECEIVED JUL 06 1992

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